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Supreme Court of the United States

October Term, 1955

No. 864

JOHN F. MORGAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
Attorney for Petitioner.

HARVEY GOLDSTEIN,
On the Petition.

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JOHN F. MORGAN,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, John F. Morgan, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in the above entitled action, rendered on January 17, 1956.

Official Report of the Court Below

The opinion of the United States Court of Appeals for the Second Circuit is unofficially reported in 1956 American Maritime Cases 302.

Jurisdiction

The opinion of the court below was filed and judgment thereon entered in the office of the Clerk of the Court on January 17, 1956.

Jurisdiction to review this decision is predicated upon the provisions of Title 28 U. S. C. § 1254(1).[1]

Question Presented

Is the constitutional right to a trial on the merits extinguished by reason of a plaintiff's default in failing to answer a calendar call?

The plaintiff in an action against the general agent, appreciating the effect of the decision of the Supreme Court of the United States in *Caldarola* v. *Eckert*, 332 U. S. 155, permitted an action against the general agent to remain unanswered on a calendar call.

This default was held to be a bar to a subsequent action against the owners of the vessel, the United States of America, pursuant to Public Law 877—81st Congress.

Statutes and Regulations Involved

46 U. S. C. § 745.[2]

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[1] 1. Title 28 U. S. C. § 1254(1).

§ 1254. Court of Appeals; certiorari; appeal; certified questions.

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *.

[2] Suits as authorized by this chapter may be brought only within two years after the cause of action arises: * * * *Provided further* that the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may thereafter be dismissed solely because improperly brought against any person * * * engaged by the United States to manage or conduct the business of a vessel owned or bareboat chartered by the United States * * *.

Statement of Facts

John F. Morgan, libelant herein, was injured on January 19, 1949, while employed as a seaman in the capacity of watchman aboard the S. S. GREEN MOUNTAIN STATE. The vessel was owned by the United States of America and was operated by the general agent, States Marine Corporation, under the standard form of General Agency Service Agreement.

Libelant brought suit against the general agent under the principles of law as laid down by this Court in *Hust* v. *Moore-McCormack,* 328 U. S. 707, in the Supreme Court of the State of New York on April 20, 1944, to recover money damages for the injuries sustained as a result of defendant's wrongful acts.

This Honorable Court, on June 23, 1947, while the Supreme Court of New York action was pending, in the case of *Caldarola* v. *Eckert, supra,* determined that, under similar circumstances, the correct party to sue was the United States of America and not the general agent.

On January 3, 1949, Congressman Lane introduced H. R. bill 483 which provided for an extension of the period of limitation to sue the government when suit was previously timely commenced against an improper party.

On March 28, 1949, libelant's action was dismissed because of his failure to appear at a calendar call of the court. Libelant's counsel, in light of this Court's decision in *Caldarola* v. *Eckert, supra,* knowing that libelant's case would be dismissed under the principles of law enunciated in said decision, did not make the meaningless application to restore the case nor was the cause restored to the trial calendar.

Public Law 877—81st Congress, the result of H. R. bill 483, was thus before the Congress but was not yet

enacted when libelant's state court action was dismissed on calendar call.

On June 27, 1949, this Court in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783, extended the doctrine of *Caldarola* v. *Eckert, supra,* to include all seamen who had sued the general agent in cases of a General Agency Agreement between said general agent and the United States of America.

Public Law 877—81st Congress—providing remedial legislation for all suits improperly brought and granting an extension of the statute of limitations under the Suits in Admiralty Act, 46 U. S. C. 741, *et seq.*, for a further one year period, was enacted December 13, 1950.

Libelant instituted the instant action against the United States of America on May 2, 1951, within the one year period of limitation provided by said remedial legislation. The district court dismissed the action as untimely, holding that the 1950 amendment was inapplicable.

The court below, in a split decision, affirmed the district court dismissal, holding that since the *McAllister* decision was handed down three months after the dismissal of the state court action, said action was not dismissed "solely because improperly brought". As such, the majority opinion failed to consider that *Caldarola* v. *Eckert,* the prime reason for the eventual enactment of Public Law 877, was decided one year and nine months before the dismissal of said state court action.

Basis of Jurisdiction of the United States District Court for the Southern District of New York

The jurisdiction of the United States District Court for the Southern District of New York was invoked upon the provisions of the Suits in Admiralty Act, 46 U. S. C. § 741, *et seq.*, and Public Law 877—81st Congress.

Reasons Relied on for the Allowance of the Writ

The court below seems to have failed to consider the decision by this Court in *Caldarola* v. *Eckert, supra,* decided on June 23, 1947, one year and nine months before the dismissal in the case at bar, consideration of which would have, by the clear interpretation of the decision of the court below, resulted in a reversal of the dismissal of the district court.

The court below strictly construed the provisions of Public Law 877—81st Congress, enacted as remedial legislation for the benefit and protection of seamen. The dismissal of this matter was erroneously affirmed on the ground that the decision of *Cosmopolitan Shipping Co.* v. *McAllister, supra,* decided by this Court three months after the dismissal on calendar call of this action, negated any assertion that said dismissal was entered solely because of commencement of an action against an improper party.

It would appear that this Honorable Court should review the question of construction to be given to remedial legislation, enacted by Congress for the benefit of all seamen, in light of the opinion by the court below which strictly construed said legislation and which failed to consider the leading decision on the issue by this Honorable Court, consideration of which would have resulted in an opposite holding.

POINT I

Public Law 877—81st Congress—remedial legislation for the benefit of seamen—should be liberally construed.

If so construed and in view of the decision by this Court in *Caldarola* v. *Eckert* and *Cosmopolitan Shipping Co.* v. *McAllister, supra,* it would appear that the court below committed error in failing to take into consideration the fact that the *Caldarola* decision by this Court preceded the dismissal of the state court action by one year and nine months.

The prior case, brought by libelant against the general agent for the same injuries arising out of the same accident as in the instant action, was dismissed because of failure of the libelant to appear at the calendar call of the trial assignment part of the Supreme Court of the State of New York.[3]

Libelant, pursuant to the provisions of Rule 302 of the Rules of Civil Practice [4] and Section 108 of the New York Civil Practice Act [5] as well as Rule III of the Trial Term Rules, Supreme Court of the State of New York, New York

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[3] Page 7a of Record.

[4] Rule 302. Dismissal of abandoned cases.

* * *

2. In the supreme court and county courts a cause hereafter marked "off" or struck from the trial term or special term calendar or unanswered on a clerk's calendar call, *and not restored within one year thereafter,* shall be deemed abandoned, and the complaint and counterclaim, if any, shall be dismissed without costs for *failure to prosecute,* and the clerk shall make appropriate entry to that effect pursuant to this rule without necessity of further order. (Italics ours)

[5] § 108. Relief against default judgments and orders. The court, in its discretion, and upon such terms as justice requires, at any time within one year after notice thereof, may relieve a party from a judgment, order or other proceeding, taken against him through his mistake, inadvertence, surprise or excusable neglect.

County,[6] could have moved to restore the case to the trial calendar of said court.

The United States Supreme Court decision in the case of *Caldarola* v. *Eckert*, June 23, 1947, *supra*, laid down the principle of law that libelant had, in fact, sued the wrong party. From the date of the said decision until the enactment of Public Law 877—81st Congress, December 13, 1950, Morgan, as well as all other similarly situated suitors throughout the nation, who had instituted actions against general agents, were "out of court" for having sued the wrong party.

This action against the United States of America as owner of the vessel was timely commenced, pursuant to the provisions of the Suits in Admiralty Act, 46 U. S. C. 741, *et seq.*, which incorporated the enactment of December 13, 1950.

Admiralty applies equitable principles.

It is well settled that Admiralty Courts, although not Courts of equity, apply equitable principles in deciding the ultimate rights of parties, predicated on considerations of conscience, justice and humanity.

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[6] Rule III. Ready Day Calendar—Reserve Calendar.

* * *

Subdivision 5. *A cause marked off calendar may be restored to the foot of the General Calendar upon the filing of a new note of issue.* The justice holding the calendar part may, however, for good cause shown, upon five days' notice of motion, order restoration of the cause to a Reserve Calendar or to a Ready Day Calendar for a day certain.

Subdivision 6. A cause hereafter marked "off" the Trial Term Calendar or unanswered on a clerk's calendar call, and not restored within a year thereafter, shall be deemed abandoned, and the complaint and counterclaims, if any, be dismissed without costs. (Italics ours)

Benedict on Admiralty, Vol. 1, 6th Ed., pocket supp. to § 71, p. 148, note 19, states:

> "Admiralty courts act upon the enlarged and liberal jurisprudence of courts of equity and so far as their powers extend they act as courts of equity. Gaynor v. The New Orleans, 1944 A. M. C. 462, 54 F. Supp. 25 (N. D. Col.). Cf. The J. Oswals Boyd, 1944 A. M. C. 543, 53 F. Supp. 103 (E. D. Mich.); The Dixie, 1940 A. M. C. 28 (E. D. Pa.); Van Camp Sea Food Co. v. Di Leva, 1949 A. M. C. 319, 171 F. (2d) 454 (C. A. 9th); Ancich v. D/S Marsha Ann, 1950 A. M. C. 1336 (S. D. Col.), aff'd in part, *sub nom.* Borcich v. Ancich, 951 A. M. C. 1701, 191 F. (2d) 392 (c. d. 9); United Fruit Co. v. U. S., 1951 A. M. C. 173, 186 F. (2d) 890 (C. A. 1); Moran Transportation Co. v. Mellina, 1951 A. M. C. 66, 185 F. (2d) 386 (C. A. 2)" (p. 37).

As early as 1839 in the case of *The David Pratt,* Fed. cases, 3597, this doctrine of "equitable" principles was enunciated:

> "• • • A court of admiralty is, as to all matters falling within its jurisdiction, a court of equity. Its hands are not tied up by the rigid and technical rules of the common law, but it administers justice upon the large and liberal principles of courts which exercise a general equity jurisdiction. Brown v. Lull [Case No. 2018]; The Fortitudo, 2 Dod. 58; The Cognac, 2 Hagg. Adm. 377."

The case of *Plummer* v. *Webb,* 4 Mason 380, Fed. cases No. 11233, more than one century ago, enunciated principles of Admiralty as applying equitable doctrines. The court stated as follows:

> "Courts of admiralty act within the sphere of their jurisdiction, as courts of equity, and administer justice *ex aequo et bono.*"

See also:

Mortensen v. *Alcoa S. S. Co.*, 101 F. Supp. 228 (S. D. N. Y.).

Equity will not decree a vain act.[7]

It is respectfully submitted that libelant would have been placed in just such position—to open up a calendar dismissal in order to receive a certain dismissal under the doctrine of law as laid down in *Caldarola* v. *Eckert* and *Cosmopolitan Shipping Co.* v. *McAllister, supra.*

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[7] *Russell* v. *Superior Journal Co.*, 47 F. Supp. 282, wherein it was held that equitable relief would be invoked in cases of accident and mistake. The court stated:

> "There is no written law placing a limit upon the power of equity to remedy and redress wrongs, neither is there any want of power in that regard in the written law. It is the crowning merit of our system that, so far as power is concerned, it is as limitless as the capacity of man to wrong a fellow man. Laun v. Kipp, 155 Wis. 347, 145 N. W. 183, 5 A. L. R. 655. Equitable relief against an unconscionable judgment may be invoked not only in cases of fraud but also upon grounds of accident and mistake. Washburn Land Co. v. White River Lumber Co., 165 Wis. 112, 161 N. W. 547. The law will not permit wrong to be inflicted upon a litigant upon the ground that technicalities, forms or rules of procedure have not been observed where justice calls for equitable relief. An equity court's power is limited to securing justice in a particular case and preventing inequitable, unconscionable and shocking results. Rio-Fall River Union Bank v. Hollnagel, 234 Wis. 181, 290 N. W. 636; 7 Wis. D. 326. Equity suffers no wrong of sufficient gravity to be appreciated by the conscience of the chancellor to go without a remedy, if the application for relief is made seasonably and with clean hands. Boring v. Ott, 138 Wis. 260, 119 N. W. 865, 19 L. R. A., N. S., 1080; 7 Wis. D. 344."

Gaskins v. *Bonfils*, 8 F. Supp. 832, aff'd 79 F.(2d) 352; *Bowles* v. *Swift & Co.*, 56 F. Supp. 679.

This is contrary to the prevailing concept of this Court, as well as the Supreme Court of the United States, that seamen are "wards of admiralty".[8]

Libelant has never had his day in court, nor has there been at any time a dismissal "on the merits".

The state court action was dismissed for plaintiff's failure to appear for a calendar call.

It is submitted that dismissal for failure to appear for a calendar call is far different than dismissal for lack of prosecution.[9]

Parker v. *United States,* 104 F. Supp. 814, was a motion to dismiss a libel as not coming within the purview of Public Law 877 after a discontinuance of the prior action. Plaintiff, in the state court action, discontinued and subsequently instituted the district court action. District Judge Kennedy, denying respondent's motion to dismiss, held:

> "[1, 2] The only question, therefore, that arises on this motion is as to what construction is to be given to Public Law 877, and specifically whether the plaintiff, who wishes to discontinue because of the McAllister case, nevertheless is unable to sue the United States unless he goes through the empty form of a dismissal. Inasmuch as Public Law 877 was intended to protect suitors who erroneously brought

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[8] *Garrett* v. *Moore-McCormack Co., Inc.,* 317 U. S. 239.

[9] Rule 302 of the Rules of Civil Procedure.

Harris v. *Harris,* 283 N. Y. S. 410, held that plaintiff's counsel's failure to appear was neither a "voluntary discontinuance" nor a dismissal "for neglect to prosecute", as based upon the case of *Sweeting* v. *Staten Island and Midland R. Co.,* 176 App. Div. 494, 162 N. Y. S. 961.

Bliss v. *Omnibus Corporation,* 169 Misc. 662, 7 N. Y. S. (2d) 979.

> suit against the general agent, in other words, is remedial legislation, I hold that under Public Law 877, a discontinuance is equivalent to a dismissal, so the motion is denied" (p. 815).

Similarly, in *Cataldo* v. *United States,* 108 F. Supp. 562, the Court denied a motion to dismiss holding that a stipulation marking the case off the calendar, was amendable to subsequent action pursuant to the provisions of Public Law 877, although not marked off solely because of *Cosmopolitan Shipping Co.* v. *McAllister, supra.*

Merlino v. *United States,* 104 F. Supp. 817, discussed the underlying intent of Congress "to save the litigants possessing meritorious claims their right to a day in court:"[10]

In its review of the background of all similarly situated libelants, the Court stated:

> "Indeed, the Senate Committee was rather vehement in stating the underlying reason for the Act. Accordingly, the amendment should be construed so as to achieve its clearly intended objectives. To apply a strict construction because the United States is the defendant would defeat, rather than achieve, the purpose of the legislative enactment" (p. 818).

See:

Cohen v. *United States,* 195 F.(2d) 1019.

Honorable Jerome N. Frank, strongly dissenting, declared that remedial legislation should be liberally interpreted, that since the plaintiff could have restored the case to the calendar, taken the dismissal of the action and properly instituted the instant action, the proper construction to be given hereto was for the court to declare the suit to be timely commenced (32a, 33a of record).

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[10] Senate Report 1782, 81st Congress, 2nd Session, 1950.

POINT II

The argument of the majority opinion of the court below must fall if consideration is given to the decision of this Court in *Caldarola* v. *Eckert*, 332 U. S. 155.

The court below held that the appeal must fail by reason of the fact that plaintiff could not have considered the dismissal in the state court to have been entered pursuant to the *McAllister* decision, that the case at bar could not have been brought pursuant to Public Law 877—81st Congress.

We respectfully submit that the *McAllister* decision was not the first case which involved the efforts of Congress to enact remedial legislation. Rather, the *Caldarola* case by this Court, which held the United States of America to be the proper party in suit was the prime moving force.

The *Caldarola* decision was handed down one year and nine months before the state court dismissal herein.

As such, the very reason for the majority opinion of the court below was based upon an erroneous conception of facts and dates of decisions pertaining to said remedial legislation, and upon the erroneous assumption that Public Law 877—81st Congress was enacted because of the *McAllister* decision.

Since the proposed legislature was first introduced on January 3, 1949, more than five months before said *McAlllister* decision, the erroneous assumptions and conclusions of the court below would seem to call for this Honorable Court to review this matter in order that a proper interpretation be judicially declared in cases of enactment of remedial legislation for the protection and benefit of seamen.

CONCLUSION

For the above stated reasons petitioner respectfully prays that this Honorable Court issue its writ of certiorari to the United States Court of Appeals for the Second Circuit in this cause.

JACOB RASSNER,
Attorney for Petitioner.

HARVEY GOLDSTEIN,
On the Petition.

APPENDIX

(Opinion of the United States Court of Appeals For the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 15—October Term, 1955

(Argued October 13, 1955 Decided January 17, 1956)

Docket No. 23342

JOHN P. MORGAN,

Libelant-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

FRANK, HINCKS and WATERMAN, *Circuit Judges*

Appeal from a judgment of the United States District Court for the Southern District of New York, Henry W. Goddard, Judge, dismissing the libel as untimely. Affirmed.

CORYDON B. DUNHAM, New York City (J. Edward Lumbard, U. S. Atty. for the Southern District of New York, and Xavier N. Sardaro, on the brief), for respondent-appellee.

HARVEY GOLDSTEIN, New York City (Mordecai Cohen and Jacob Rassner on the brief), for libelant-appellant.

WATERMAN, *Circuit Judge*:

The libelant was injured on January 19, 1944, while serving as a watchman aboard the S.S. Green Mountain State. The ship was owned by the United States and was being operated by a general agent under the standard form of General Agency Service Agreement.

The libelant brought suit against the general agent in the Supreme Court of the State of New York on April 20, 1944, to recover for his injuries. On March 28, 1949, that action was dismissed because of the failure of the libelant to appear at a calendar call of which he had been duly notified on March 25, 1949.

On June 27, 1949, the United States Supreme Court in *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783, reversing our decision in *McAllister* v. *Cosmopolitan Shipping Co.,* 169 F. 2d 4 (2d Cir., 1948), decided that the general agent of the United States was not liable for the negligence of the masters and crews with whom the United States has manned vessels operated under general agency agreements.

Thereafter the 81st Congress on December 13, 1950 amended 46 U. S. C. S. 745 (P. L. 877, 81st Cong., 2d Sess.), extending until December 13, 1951 the period of limitation applicable to a suit in admiralty by a seaman against the United States.

> "* * * if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States.* * *"

The purpose of this amendment, as stated by the Senate Committee on the Judiciary, was "* * * that litigants

should not be made the victims of the legal confusion regarding the proper remedy in such cases, and are not responsible for the conditions brought about by lack of clarity in the opinions of the Supreme Court". 1950 U. S. Cong. Code Service, p. 4210. See *Cohen* v. *United States*, 195 F. 2d 1019, 1021 (2d Cir., 1952).

In May, 1951, this suit on the same cause of action as the state court suit brought April 20, 1944, was brought against the United States in reliance upon the amendment to 46 U. S. C. § 745. The District Court, per Goddard, J., dismissel the libel as untimely, holding that the 1950 amendment was inapplicable. *Morgan* v. *United States*, 121 F. Supp. 941 (S. D. N. Y., 1954). Libelant's appeal raises only the question whether the dismissal of libelant's prior action in the Supreme Court of New York was "solely because improperly brought against" the wrong party.

The requirements of the remedial amendment of 1950 are clearly met when the order of dismissal of the prior action against the general agent shows affirmatively that the dismissal was because the action was brought against the wrong party. See *Soriano* v. *American Liberty S.S. Corp.*, 13 F. R. D. 455 (E. D. Pa., 1952). Where the court record is silent as to the reason for discontinuance or dismissal, but the libelant or his attorney has convinced the court by affidavit or otherwise that the dismissal or discontinuance resulted from a recognition by counsel that the action would not lie against the general agent, the requirements of the amendments have been held to be satisfied. *Parker* v. *United States*, 104 F. Supp. 814 (E. D. N. Y., 1951); *Cataldo* v. *United States*, 108 F. Supp. 560 (S. D. N. Y., 1952). But where dismissal is based upon lack of prosecution, the dismissal is not "solely because improperly brought against" the wrong party. *Kalil* v. *United States*, 107 F. Supp. 966 (E. D. N. Y., 1952); *Slemp* v. *United States*, 112 F. Supp. 351 (S. D. N. Y., 1953; and *Jett* v. *United States*, 1953 A. M. C. 233 (S. D. N. Y., 1952).

Libelant cannot and does not assert that his failure to appear was motivated solely by the Supreme Court *McAllister* decision, since his omission occurred three months prior to that decision while the ruling law in this circuit was that the general agent was the proper party defendant to the libel. *McAllister* v. *Cosmopolitan Shipping Co.*, 169 F. 2d 4 (2d Cir., 1948). Therefore, he cannot bring himself directly within the *Cataldo* and *Parker* cases, *supra*.

The libelant contends, however, that under New York practice he could have moved to restore the prior action against the general agent to the calendar of the Supreme Court of New York within one year from the date of his non-appearance. If he had done so and if the court had granted his motion, the prior action could then have been dismissed, with the record showing that the reason for dismissal was that the suit had been brought against an improper party.

The libelant argues that it is inequitable to penalize him for failure to take these "formal" steps which would have brought him within the express terms of the remedial statute. In essence his argument is that the dismissal did not become final until March of 1950, which was nine months after the *McAllister* decision; and that, in construing the statutory phrase "dismissed solely because improperly brought against [the wrong party]", we should consider his reasons for failing to reinstate the case on the calendar.

Assuming, *arguendo*, the validity of the libelant's statutory interpretation, we think he has still not brought himself within the statute. He has offered no explanation for his failure to appear at the calendar call. For aught we know whatever reasons prompted his failure to appear continued during the one year period and motivated his failure to restore. Unlike the *Cataldo* and *Parker* cases, *supra*, the libelant here has not convinced the District Court that his sole reason for suffering the dismissal was

based on the statutory ground. Even if we assume that under New York practice the libelant could have restored his action to the calendar within the year ending March, 1950, and that the dismissal did not become final until that date, we find no basis for concluding that the sole reason for the dismissal was the *McAllister* decision. Clearly, the reason for libelant's failure to appear in March, 1949, could not have been the statutory one; and, absent affidavits or other offers of proof, the natural inference of a continuing motivation, whatever such motivation was, has not been rebutted. Libelant does not contend that *but for* the decision in *McAllister* he would have taken steps to restore his case to the calendar. He contends rather that *if* the case had been restored to the calendar and then dismissed he *would* be within the statutory grounds. But under libelant's own interpretation of the statute the crucial issue is not the hypothetical question of what he *could* have done, but whether *in fact* his sole reason for suffering final dismissal in March 1950 was the statutory one. We conclude that libelant has failed even to bring himself within such an interpretation of the statute and accordingly his argument avails him nothing.

Affirmed.

FRANK, *Circuit Judge* (dissenting):

Here we engage in interpreting a federal remedial statute, 46 U. S. C. Section 745, enacted to benefit seamen. My colleagues reject any but a strictly literal interpretation.

The New York state court suit was dismissed on March 28, 1949. Under the New York practice (cited by my colleagues), libellant had a year (*i.e.*, until March, 1950) within which to move to restore that suit to the calendar. Nine months of that year still remained when the Supreme Court decided *McAllister,* 337 U. S. 783. I think no one

doubts that, if within these nine months, libellant had moved the New York court (a) to reinstate the state-court suit and then (b) to dismiss it, on account of *McAllister*, that court would have granted the motion. My colleagues, if I understand them correctly, agree that, had that been done, the instant case would have been timely begun as within 46 U. S. C. Section 745. They hold it untimely solely because libellant did not follow an empty ceremony (*i.e.*, reinstating the state-court suit and then having it dismissed). I had thought that our court, long taught by Judge Learned Hand, would never be the slave of literal language, would always recognize that it is "one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary".[1] That is ancient learning.[2] (Indeed, an early seventeenth-century English commentator suggested the removal of a judge, for violation of his oath of office, if he "held himself in his judgments precisely or rather austerely to the letter of the lawe" without regard to its spirit.[3] Of course, I think that suggestion inapplicable here.) To exalt the literal meaning at the expense of the purpose of a statute is especially surprising when, as here, the legislature aimed to help seamen, traditionally the wards of admiralty. See, *e.g. Wilder* v. *Inter-Island Navigation Co.*, 211 U. S. 239.

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[1] *Cabell* v. *Markham*, 148 F. (2d) 737, 739 (C. A. 2).

[2] For other early expressions of that attitude, see *United States* v. *Lennox Metal Manufacturing Co.*, 225 F. (2d) 302, 311 (C. A. 2).

[3] Hake, Epieikia (Yale Law Library Publications, 1953) 29.

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeal, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of January one thousand nine hundred and fifty-six.

Present:

HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
Circuit Judges.

JOHN F. MORGAN,
Libellant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs taxed in favor of the appellee.

/s/ A. DANIEL FUSARO,
Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 864

JOHN F. MORGAN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 2a) is reported at 121 F. Supp. 941. The opinion of the Court of Appeals (R. 28a-33a, Pet. App. 15-20) is reported at 229 F. 2d 291.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 21) was entered on January 17, 1956. The petition for a writ of certiorari was filed on April 16, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

After this Court's decision in *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U.S. 783, holding that the United States, as owner of a vessel, rather than its general agent, is liable for the negligence of the master and crew, the period of limitations for a suit against the United States was enlarged, provided, however, that such suit was "based upon a cause of action whereon a prior suit * * * was timely commenced [against a general agent] and was * * * dismissed solely because improperly brought against" the wrong party defendant (46 U.S.C. 745). Petitioner's prior state court suit against a general agent was dismissed because he failed to appear when the case was called for trial. The state court has authority, under certain conditions and in its discretion, to relieve a party from a default judgment, but petitioner did not seek such relief.

The question presented is whether, in the circumstances of this case, petitioner's prior suit was "dismissed solely because improperly brought against" the wrong party defendant.

STATUTES INVOLVED

The pertinent statutory provisions and rules are set forth in the Appendix, *infra,* pp. 17-21.

STATEMENT

Petitioner injured his left ankle on January 19, 1944, while employed by Van Hoesen & Brother as a watchman on board the *S.S. Green Mountain State* (R. 7a-8a, 22a). The accident allegedly resulted from the negligence of the crew (R. 22a). The vessel was owned by the United States and was being operated by States Marine Corporation as General Agent (R. 7a). On April 20, 1944, three months after his accident, petitioner instituted suit against the general agent in the New York Supreme Court, New York County, to recover damages (R. 8a). Issue was joined and the cause was placed on the calendar (*ibid.*).

The cause was advanced to the Ready Calendar in March, 1949, and thereafter was passed from day to day awaiting a trial part (*ibid*).[1] On March 25, 1949, the Clerk of the Trial Term, Part II, notified defendant's counsel that the case would be assigned for trial on March 28, 1949 (*ibid.*).[2]

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[1] As to the calendar practice, see fn. 8, *infra*, pp. 13-14.

[2] The calendar clerk telephones counsel when his case is about to be assigned for trial. Rule III, subd. 3, New York County Supreme Court Rules, *infra*, pp. 19-20 (see *Cahill-Parsons New York Civil Practice*, 2d Ed., p. U-58). Petitioner's counsel does not suggest that he did not receive this notification.

On March 28th, the defendant appeared for trial. A trial part was available, but neither the petitioner nor his attorney appeared. Thereupon, the court on its own motion dismissed the action against the general agent because of the failure of the petitioner or his attorney to be present (R. 8a-9a, 12a). At no time thereafter did petitioner take any step to vacate or disturb that dismissal.

In June of that year, this Court rendered its decision in *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U.S. 783, holding that a general agent employed by the United States to manage certain phases of the ship's business is not liable for injuries sustained through the negligence of the ship's master and crew. Prior to that decision, it had appeared that a seaman's remedies were available either against the general agent or against the United States.[3] *Cosmopolitan Shipping Co.* made it clear that the remedies are available only against the United States. A number of litigants who had previously brought suit against the general agents accordingly found that they had sued the wrong party and that, in the meantime, the two year period of limitations[4] applicable to a suit against the United States had expired. To afford these litigants an opportunity to have their claims heard, Congress on December 13, 1950,

[3] Cf. *Hust* v. *Moore-McCormack Lines,* 328 U.S. 707, expressly overruled in *Cosmopolitan Shipping Co., supra.*

[4] 46 U.S.C. (1946 Ed.) 745.

some eighteen months after the *Cosmopolitan Shipping Co.* decision, amended the statute of limitations so as to give such litigants an additional year within which to bring suit against the United States. 64 Stat. 1112, now 46 U.S.C. 745 (*infra*, p. 17).

The amendment, however, permitted suit against the United States only if the suit was founded upon a cause of action "whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States." *Ibid.*

Relying on the amendment, petitioner brought the instant action against the United States by filing a libel in the United States District Court for the Southern District of New York on May 2, 1951 (R. 20a). Subsequently, on motion by the United States (R. 6a *et seq.*), the District Court dismissed the libel as untimely, holding that the 1950 amendment to 46 U.S.C. 745 was not applicable because petitioner's earlier "suit in the state court was not dismissed *solely* because improperly brought against the general agent," as required by the amendment (R. 2a; emphasis in original).

On appeal, the Second Circuit affirmed, one judge dissenting. The opinion (R. 28a-33a, Pet.

App. 15-20) observes that petitioner failed to convince the district court that his sole reason for suffering dismissal of the prior suit was the statutory ground; that, in permitting the dismissal, petitioner could not have been motivated by the decision in the *Cosmopolitan Shipping Co.* case since that case was not decided until three months later; that, even if petitioner could have reinstated his prior case on the calendar and then caused it to be dismissed, the fact is that he did not do so and that he offered no explanation, either by affidavit or otherwise, for permitting dismissal or for failing to reinstate; that, in the absence of any offer of proof as to his reasons for failing to reinstate, there is no basis for concluding that the sole reason was the statutory one; and that the crucial issue is not what petitioner could have done, but whether in fact his sole reason for permitting the dismissal to become final was the statutory one. The dissent states that the majority opinion holds petitioner's action untimely because he did not follow "an empty ceremony (*i.e.*, reinstating the state-court suit and then having it dismissed)", and that this exalts the literal meaning of the amendatory statute at the expense of its purpose to help seamen.

ARGUMENT

1. The 1950 amendment of the Suits in Admiralty Act lifted the bar of the statute of limitations for a brief period to permit suit against the

United States by those claimants who had previously brought a timely action against the general agent but whose prior action had been dismissed "solely because improperly brought" against the wrong party defendant (46 U.S.C. 745, *infra*, p. 17; see S. Rept. No. 1782, 81st Cong., 2d Sess.). The single question here is whether, in the particular circumstances of this case, petitioner's prior action in the Supreme Court of New York was dismissed "solely because improperly brought" against the general agent. Both the district court and the court below found, on the basis of the affidavits and evidence presented, that petitioner had failed to establish that his prior action was dismissed for that reason. He failed, in other words, to meet the explicit and fundamental requirement of the statute. Whether or not that requirement was met is essentially an issue of fact and it is primarily a review of an adverse factual determination which petitioner seeks in this Court. Petitioner does not claim a conflict on the question presented, nor does he show that the question is of any current or general importance. He does not point to any other claimants similarly situated, nor does he point to any other pending case involving a like question. Moreover, it is evident that the question is not likely to recur. This follows from the fact that the amendment lifted the bar of limitations only for a period of one year, ending December 13, 1951 (*infra*, p. 17).

It has no application to any suit filed since that date.

2. Apart from the fact that the challenged decision appears to have no significance beyond the instant case, we believe that the result reached below is correct.

a. The 1950 amendment of 46 U.S.C. 745 was not a blanket extension of the statute of limitations or a revival of rights for all claimants. Both its language and its legislative history demonstrate a Congressional purpose to lift the bar of limitations for a very narrow class of litigants, namely, those whose prior suit against the general agent "was timely commenced and was or may hereafter be dismissed *solely* because improperly brought against" the wrong person (46 U.S.C. 745; emphasis supplied).[5] The test imposed by

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[5] This restricted purpose is emphasized by the committee reports accompanying the bill. "The cases to be affected are those where timely suits against Government agents have been dismissed solely because improperly brought against the agent. • • • It is important to note that the bill in itself is designed to provide relief only in those cases where suits were dismissed, though timely brought, solely because brought against an improper party, and where the time for suits against the United States under existing law had expired. • • • [F]igures are not available as to the number of claimants who would benefit by the bill, although the number is considered to be relatively few." S. Rept. No. 1782, 81st Cong., 2d Sess., pp. 1, 3. See also S. Rept. No. 2535, 81st Cong., 2d Sess., p. 3; H. Rept. No. 2060, 80th Cong., 2d Sess., pp. 2, 3; H. Rept. No. 1292, 81st Cong., 1st Sess. And see 95 Cong. Rec. 12098. These reports demonstrate that there is

the statute is not whether the claimant had a prior suit against a general agent which *somehow* resulted in a dismissal; the test is whether such dismissal resulted *solely* from suing the wrong party. Petitioner does not meet that test. While he sued the general agent in the belief that it was a proper party defendant, the inescapable fact is that the dismissal was not based on the ground that he had sued the wrong party defendant. The dismissal was for an independent reason, one which would have caused dismissal even if the right party defendant had been before the court, *viz.,* that petitioner and his counsel failed to appear when the case was called for trial.

The word "solely" was employed in the statute "to limit the effective ground of dismissal as to the general agent to a dismissal because it was an improper party as distinguished from a dismissal as to it for any other reason as, for instance, one on the merits." *Cohen* v. *United States,* 195 F. 2d 1019, 1021 (C.A. 2). Not only does a dismissal on the merits fail to meet the statutory requirement (*Weilbacher* v. *J. H. Winchester & Co.,* 197 F. 2d 303 (C.A. 2)); a dismissal based upon lack of prosecution similarly fails. *Kalil* v. *United States,* 107 F. Supp. 966 (E.D. N.Y.); *Slemp* v. *United States,* 112 F. Supp. 351 (S.D. N.Y.); *Jett* v. *United States,* 1953 A.M.C. 233 (S.D.

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no divergence whatever between the purpose of the legislation and the literal meaning of the language employed in the statute.

N.Y.). A dismissal based upon a plaintiff's failure to appear when the case is called for trial is substantially the equivalent of a dismissal for lack of prosecution (cf. Rule 302, N.Y. Rules of Civil Practice, *infra*, p. 18).[6] But even if it were otherwise, the significant point is that such a dismissal is not a dismissal based upon lack of the proper party defendant. The 1950 amendment was aimed at helping those who were out of court solely because they had sued the wrong party. "There is a manifest difference between a suitor who has mistaken his remedy and one who has persisted in refusing to pursue the remedy which he has chosen to seek" (*Kalil, supra,* at p. 967).

The 1950 statute was, of course, a remedial one and as such is entitled to a liberal construction. *Cohen* v. *United States, supra.* It is for that reason that the courts will look beyond the record of the prior case, if that record is silent or ambiguous

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[6] The cases to the contrary, relied on by petitioner (Pet. 10 at fn. 9), were decided prior to October 15, 1942, the date Rule 302, N.Y. Rules of Civil Practice, was adopted. That Rule specifies that a cause marked off the calendar and not restored within a year thereafter shall be "dismissed * * * for failure to prosecute * * *." A case marked off the Trial Term Calendar of the New York County Supreme Court and not restored within a year must be dismissed pursuant to Rule 302, *supra.* Rule III, subd. 6, New York County Supreme Court Trial Term Rules, *infra*, p. 21. Petitioner's quotation of Rule III, subd. 6 (Pet. 7 at fn. 6), is incomplete since it omits the following words which should appear before the period: "pursuant to Rule 302 of the Rules of Civil Practice." But see fn. 8, *infra*, pp. 13-14.

or does not reflect the true reason for dismissal, to determine whether the statutory requirement is met. Thus, in *Cataldo* v. *United States,* 108 F. Supp. 560 (S.D. N.Y.) where the record reason for the prior dismissal was lack of prosecution (resulting from the failure of plaintiff's counsel to oppose dismissal when the case was called on the court's Dismissal Calendar), it was established by affidavit submitted in the suit later brought against the United States that the parties had agreed that the first case should be dismissed or be taken off the calendar in view of this Court's decision in *Cosmopolitan Shipping Co.* (108 F. Supp. at 562). Likewise, in *Parker* v. *United States,* 104 F. Supp. 814 (E.D. N.Y.), the claimant established that he had discontinued his action against the general agent solely on the basis of the *Cosmopolitan Shipping Co.* decision, and the court, viewing the statute liberally, held a discontinuance to be the equivalent of a dismissal. See also, *Merlino* v. *United States,* 104 F. Supp. 817 (S.D. N.Y.) (allowing amendment of the libel so as to permit proof that the prior action was dismissed for the statutory reason).

But, unlike the claimants in *Cataldo* and *Parker,* petitioner failed to show that he permitted his prior action to be dismissed solely because he had sued the wrong party. Obviously, since the *Cosmopolitan Shipping Co.* case was decided three months after the dismissal of the prior

action, that decision could not have motivated petitioner in permitting the action to be dismissed. As the court below stated (Pet. App. 18-19):

> He has offered no explanation for his failure to appear at the calendar call. For aught we know whatever reasons prompted his failure to appear continued during the one year period [following dismissal] and motivated his failure to restore. * * * Clearly, the reason for libelant's failure to appear in March, 1949, could not have been the statutory one; and, absent affidavits or other offers of proof, the natural inference of a continuing motivation, whatever such motivation was, has not been rebutted.[7]

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[7] The petition asserts (Pet. 2, 3, 12) that counsel permitted the dismissal of, and did not seek to restore, the prior case because of his reliance on *Caldarola* v. *Eckert*, 332 U.S. 155, decided in 1947. But this assertion is *dehors* the record. No such explanation is set forth in the affidavits of record. Petitioner made no showing below that he was misled into doing or failing to do anything. There is, therefore, no occasion for the application of principles of equity, nor, in any event, can equity decree contrary to the statute. Moreover, Mr. Jacob Rassner, counsel for petitioner both here and in the Supreme Court of New York (R. 8a-9a), was also counsel for respondent in *Cosmopolitan Shipping Co.* v. *McAllister* (337 U.S. at p. 784). On the face of it, it would hardly appear that counsel who had won the *Cosmopolitan* case in the Court of Appeals and was vigorously urging affirmance in the U. S. Supreme Court had so little confidence in his position that he permitted the dismissal of the instant case because of the opinion in *Caldarola*.

b. Petitioner argues that the decision below turns upon his failure to perform "a vain act" (Pet. 9-11). He argues that after the dismissal of his state court case he could have moved to have that case restored to the calendar, but that this would have been a vain act because, after accomplishing it, he would have had to dismiss the case anyway since his suit had been brought against the wrong party. The dissenting opinion accepts this view and characterizes the procedure as "an empty ceremony." (Pet. App. 20). Both the petitioner and the dissent proceed on the assumption that getting the case restored to the calendar is little more than a formality and is virtually automatic under the New York practice (Pet. 6-7, 19).

But this assumption is not a correct one. Petitioner relies (Pet. 6-7 at fns. 4, 5 and 6) on three provisions relating to New York practice: (i) Rule III of the Trial Term Rules of the New York County Supreme Court, (i) Rule 302 of the Rules of Civil Practice, and (iii) § 108 of the New York Civil Practice Act, *infra*, pp. 18-21). The first two, by their terms, cover the situation in which a case has merely been *marked off the calendar,* and not, as here, the situation in which a case has been *dismissed.*[8]

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[8] Under the New York County Supeme Court Rules (see *Cahill-Parsons New York Civil Practie,* 2d Ed., pp. U-57 *et seq.*), after issue is joined the case is put on a general trial calendar, which usually has one call each year (Rule II, subd

This distinction, ignored by petitioner and apparently overlooked by the dissenting judge below, is an important one. A case marked off the Ready Day Calendar may be restored to the foot of the general calendar simply upon filing a new note of issue (Rule III, subd. 5, *infra*, p. 20); if not restored within a year, the cause is deemed abandoned and must then be dismissed for failure to prosecute (Rule III, subd. 6, *infra*, p. 21; Rule 302, R.C.P., *infra*, p. 18). Thus, a case marked off the calendar remains pending for at least a year even though the plaintiff does nothing further.

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5). As other cases are disposed of, the case works its way up the calendar until it is advanced to a so-called "Reserve Calendar," which is made up each week (Rule III, subd. 1). Cases on the Reserve Calendar, after call, will be marked either "ready", so as to advance to a so-called "Ready Day Calendar," or are postponed to a subsequent Reserve Calendar (Rule III, subd. 2). Cases on the Ready Day Calendar are assigned to a justice for trial (Rule III, subd. 3). If the plaintiff fails to appear at either the general calendar call or the Reserve Calendar call, the case will be dismissed on motion of the defendant; if neither party appears, it will be marked off the calendar and subsequently restored only upon good cause shown on motion. Rule II, subd. 5; Rule III, subd. 2.

But the rule is different as to the Ready Day Calendar. Rule III, subd. 3 (*infra*, pp. 19-20) provides in part: "Causes on the Ready Day Calendar must be ready for trial and if not ready will be marked 'off,' 'dismissed' or 'for inquest,' unless adjourned by the justice holding the calendar part upon good cause shown by affidavit to have arisen after such causes had been placed on the Ready Day Calendar." Petitioner's suit against the general agent was dismissed on the court's own motion, as distinguished from being marked off the calendar, under this latter Rule (R. 9a, 12a).

Where, however, instead of marking the case off the calendar when plaintiff fails to appear for trial, the court dismisses the case, as it may under the Rules, that ends the matter. In that situation—which was petitioner's case—restoration is not available simply upon the filing of a new note of issue. To reinstate his cause in these circumstances, a party must proceed under § 108, N.Y.C.P.A. (*infra,* p. 18), which empowers the court, in the exercise of its discretion, to relieve a party against a default judgment. And § 108 (the third provision cited by petitioner) affords relief only when the judgment was "taken against him through his mistake, inadvertence, surprise or excusable neglect" (*ibid.*). The record in the present case is silent as to whether petitioner's conduct was excusable on any one of these four grounds.

The excuse belatedly advanced in the petition, as distinguished from what appears in the record (see fn. 7, *supra,* p. 12), indicates a deliberate avoidance of the call for trial, without any effort by petitioner to give notice either to the court or to opposing counsel or to explain his conduct. It is thus difficult to see how the excuse now suggested can meet any of the four allowable grounds for relief. Cf. *Colonial Fuel Corp.* v. *Kahn,* 214 App. Div. 83, 211 N.Y.S. 50; *La Vin* v. *La Vin,* 279 App. Div. 873, 110 N.Y.S. 2d 240. But assuming that the New York court *could* have reinstated the cause if petitioner had attempted to present

his excuses to that court, it is, at the least, conjectural whether it would have exercised its discretion in his behalf (cf. *ibid; Orlando* v. *Doyle,* 111 N.Y.S. 2d 735), and, if it did so, what terms or conditions it might have attached. See § 108, *supra; cf. Kemelhor* v. *Kravitz,* 203 Misc. 370, 118 N.Y.S. 2d 587. These problems, which petitioner and the dissenting judge ignore, emphasize the correctness of the decision below that "the crucial issue is not the hypothetical question of what [petitioner] *could* have done, but whether *in fact* his sole reason for suffering final dismissal in March 1950 [when the time to seek relief against the default judgment expired] was the statutory one" (Pet. App. 19; emphasis in original). By his failure, both in state and federal courts, to make any showing, petitioner, himself, has effectively prevented such a factual determination.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

PAUL A. SWEENEY,
LESTER S. JAYSON,
Attorneys.

May 1956.

APPENDIX

1. 46 U.S.C. 745, as amended December 13, 1950, 64 Stat. 1112, provides in pertinent part as follows:

> § 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived * * *.
>
> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel * * *.

2. § 108 of the New York Civil Practice Act provides as follows:

> § 108. Relief against default judgments and orders. The court, in its discretion, and upon such terms as justice requires, at any time within one year after notice thereof, may relieve a party from a judgment, order or other proceeding, taken against him through his mistake, inadvertence, surprise or excusable neglect.

3. Rule 302 of the New York Rules of Civil Practice provides in pertinent part as follows:

> Rule 302. Dismissal of abandoned cases. * * *
>
> 2. In the supreme court and county courts a cause hereafter marked "off" or struck from the trial term or special term calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned, and the complaint and counterclaim, if any, shall be dismissed without costs for failure to prosecute, and the clerk shall make appropriate entry to that effect pursuant to this rule without necessity of further order.

4. New York County Supreme Court Rules as to Trial Terms provide in pertinent part as follows:

Rule III.

Reserve Calendar—Ready Day Calendar. Subd. 1. The calendar clerk shall make up from the causes on the Trial Calendar a Reserve Calendar for each Friday to be called at Trial Term, Part II * * *.

* * * * *

Subdivision 2. After a cause first appears on a Reserve Calendar it shall not be adjourned by stipulation for more than a total period of three months. Excuses or applications for postponement must be made by affidavit on the call of the Reserve Calendar. Causes on the Reserve Calendar must be marked either "ready" so as to advance to a place on the Ready [Day] Calendar or be adjourned to a subsequent Reserve Calendar. If upon the call of the Reserve Calendar the plaintiff fails to appear the complaint will be dismissed on motion of the defendant, and likewise, if the defendant fails to appear and the plaintiff appears, the cause will be marked for inquest and set for such part and time as the justice holding the calendar part shall direct. If upon the call no answer is made by any of the parties the cause will be marked off the calendar and subsequently restored only upon good cause shown on five days' notice of motion. Causes on the Reserve Calendar, if marked "ready," will be added in sequence to the Ready Day Calendar.

Subd. 3. The calendar clerk shall make up daily from the causes marked "ready" on the Reserve Calendar calls, the Ready Day

Calendars * * *. Causes on the Ready Day Calendar must be ready for trial and if not ready will be marked "off," "dismissed" or "for inquest," unless adjourned by the justice holding the calendar part upon good cause shown by affidavit to have arisen after such causes had been placed on the Ready Day Calendar. "Ready" causes will be assigned to the various parts for trial. Thereafter causes will be assigned by the Trial Term calendar clerk, under the direction of the justice holding the calendar part, to the various parts for trial as required. In all causes marked "ready" counsel must keep in touch with their clients and witnesses so that they will be available when needed. Counsel will leave their telephone numbers with the calendar clerk, and such clerk will communicate with the office of counsel as causes are about to be assigned for trial. A notice showing the condition of each trial part will be posted in the office of the calendar clerk. All questions arising with respect to the calendar shall be referred by the calendar clerk to the justice holding the calendar part.

* * * * *

Subd. 5. A cause marked "off calendar" may be restored to the foot of the Trial Calendar upon the filing of a new note of issue. The justice holding the calendar part may, however, for good cause shown, upon five days' notice of motion, order restoration of the cause to a Reserve Calendar or to a Ready Day Calendar for a day certain.

Subd. 6. A cause hereafter marked "Off" the Trial Term Calendar or unanswered on a clerk's calendar call, and not restored within a year thereafter, shall be deemed abandoned, and the complaint and counterclaim, if any, be dismissed without costs, pursuant to Rule 302 of the Rules of Civil Practice.

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